Office-Supreme Court, U.S.
FILED
1983 JAN 28
ALEXANDER L. STEVAS,
CLERK

NO. 82-1033

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF OHIO,

Petitioner,

vs.

BERNARD H. WILMOTH

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

JAMES R. WILLIS, ESQ.
Attorney for Respondent
Suite 1609, Bond Court
Building
1300 East Ninth Street
Cleveland, Ohio 44114
(216) 523-1100

MICHAEL J. SCHERACH
Counsel for Petitioner
Lorain County, Ohio
226 Middle Avenue
Elyria, Ohio 44035

QUESTIONS PRESENTED

1. Whether a search warrant can be issued on the basis of an affidavit containing misrepresentations so serious that without which probable cause is not shown.

2. Assuming the validity of a search warrant for the seizure of certain described property, can the police seize other property not described in the warrant solely for the purpose of checking it out in the process keeping and retaining such property indefinitely (during the course of which further searches are repeatedly made) before it is determined (if it ever was) that certain parts of the truck were stolen.

3. Can the police on the basis of a search warrant seize property not specifically enumerated in the warrant as property to be seized, where such property

could not be said at the time of the seizure to be stolen property or contraband.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED . . .	i
TABLE OF CONTENTS . . .	iii
TABLE OF AUTHORITIES . .	vi
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE . .	2
ARGUMENT	3
I. Where a search warrant affidavit contains serious misrepresentations, the question that must be resolved is whether, absent the contributions made by such misrepresentations, the affidavit sufficiently supported the issuance of a warrant for the seizure of the property described therein. . . .	6

II. Officers in executing a search warrant for particularly described motor vehicles, which were in fact located and seized, are not authorized to further search and actually seize property that the officers neither knew, nor had probable cause to believe, was seizable property for the express purpose of checking it out. 10

III. Even assuming the police have probable cause to seize a particular motor vehicle as probable stolen property, a warrant is nonetheless required as a condition precedent to

conducting a meticulous general or exploratory search of such vehicle in an effort to verify whether the vehicle or any of its parts were, in fact, stolen. . 14

CONCLUSION 17

TABLE OF AUTHORITIES

	Page
Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971) . .	3
Franks v. Delaware, 438 U.S. 154 (1978)	9
Mapp v. Ohio, 367 U.S. 643 (1961)	17
Preston v. United States, 376 U.S. 364, 367-368 (1964) . .	15
State v. Dodson, 43 Ohio App. 2d 31 (1974)	7
State v. Wilmoth, 1 Ohio St.2d 118 (1982)	1
United States v. Chadwick, 433 U.S. 1, 13 (1977) . . .	15
United States v. McDonald, 335 U.S. 451 (1948) . . .	17
United States v. Sedillo. 496 F.2d 151, 152 (9th Cir. 1974) .	18
Wong Sun v. United States, 371 U.S. 471 (1963) . . .	13

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-1033

STATE OF OHIO, PETITIONER

v.

BERNARD WILMOTH, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Ohio Supreme Court, reported as State v. Wilmoth, 1 Ohio St. 2d 118 (1982) and the opinion of the Ohio Court of Appeals are attached to the Petition.

JURISDICTION

The judgment of the Ohio Supreme Court having been entered and finalized

on August 4, 1982, makes it at once apparent that the petition for writ in this cause was not timely filed. This being so, this Court lacks jurisdiction to consider the petition -- or so it would seem. Rule 20.1, Rules of The Supreme Court, (1980 Revisions).

STATEMENT

The critical facts are aptly stated in the opinion by the Ohio Supreme Court. In a nutshell the police armed with a warrant that authorized the search of an auto repair shop for certain specific vehicles "proceeded to scrutinize all vehicles" on the premises "including some parked outside." During the course of their efforts two vehicles owned by respondent were seized although they were not identified in the warrant. Following their seizure, which was for the purpose of checking them out, appro-

ximately a month later certain parts were identified as having been stolen.

On appeal the intermidiate Court of Appeals reversed the conviction. This judgment, which turned on the trial court's erroneous denial of the Motion to Suppress, was affirmed by the Ohio Supreme Court in State v. Wilmoth, supra.

ARGUMENT

We rely on the opinions of the Ohio Supreme Court and the Ohio Court of Appeals to support our opinion that the trial court erroneously denied the Motion to Suppress. In our view, what counsel fails to recognize in assailing the opinions below is that "the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at least emerges". Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971).

Yet, this, of course, is precisely what happened here. For having actually found the property described in the warrant (a fact even the State concedes happened before the property in this case was seized), the officers, and their expert, arbitrarily extended their exploratory search to all other vehicles anywhere on the premises.

Even this is not all, it is certainly relevant here that the officers' reasons relevant here that the officers' reason for taking the so called expert along could not have been for his help in locating the property precisely described in the warrant. To be sure then, what is obvious from the fact of the expert's presence is that the officers fully expected to conduct, on their own authority, a general or exploratory search of these premises. It is this flagrant circumstance that activates an aspect of

Coolidge that is not easily understood, but must nonetheless be reckoned with. Here, we refer to the "inadvertant" discovery concept. In a nutshell, the point here is that if these officers had wanted to search for property other than that particularized in the warrant they should have submitted the information that caused them to enlist the aid of their expert to the court as a possible basis for a broader search. But, of course, that was not done because such information (if there was any) would not have been sufficient to justify the issuance of a warrant of authority. Also a warrant to search for possible stolen property would, in any event be deemed too general to pass muster.

I

Where A Search Warrant Affidavit Contains Serious Misrepresentations, The Question That Must Be Resolved Is Whether, Absent The Contributions Made By Such Misrepresentations, The Affidavit Sufficiently Supported The Issuance Of A Warrant For The Seizure Of The Property Described Therein.

At the outset, it should be understood the trial court was surely aware from the evidence produced at the motion hearing that the affiant had willfully misrepresented how he acquired the information set forth as the critical averments in his affidavit (SH 38-40; 47-62). Here we refer to the fact that the affiant wilfully concealed from the Court

posely trespassed, while off duty, onto the private premises here involved. And, he likewise concealed the fact of his crawling under certain vehicles parked thereon in search of information relative to certain numbers and other identification aspects thereof.

For our part, even the Ohio Court that wrongly decided State v. Dodson, 43 Ohio App. 2d 31 (1974), which actually condoned open perjury by an affiant en route to validating the search made therein, would draw the line against approving what occurred here. For at least in Dodson, the Court had to convince itself the officer's blatant perjury related to matters that did not defeat the presence of probable cause in the affidavit or render him unworthy of belief. Thus it was concluded, in that case, such perjury did not prevent them

from gospelizing the credibility of the affiant because he was a police officer. In any event, the conclusion was made in Dodson that since the affidavit contained probable cause, such was all that was required.

Here, of course, we have a deliberate failure by the affiant to reveal in his affidavit that it was necessary for him to commit a criminal offense (trespassing) in his quest for a sufficient basis to apply for the issuance of a warrant. Nor, did he mention actually being caught in the process of actually searching these vehicles (SH 47, et. seq.).

Again, in his affidavit, the affiant asserted that he was on patrol when his original observations were made. Hence, it cannot be denied that the officer misrepresented to the Court that his

knowledge, which supplied the factual substance in the affidavit, was acquired while he was on routine patrol. This is so because the facts verify he was off duty (SH 49) at the time.

For our part, had the trial court credited Franks v. Delaware, 438 U.S. 154 (1978), there is no way the warrant issued here should have survived meaningful scrutiny. In addition, and as further background for the arguments made below, the facts here show these officers were aware the property listed to be seized were the "two Ford automobiles, two Mercury automobiles, and a 4-wheel drive truck frame" (SH 62) that had been seen by the affiant on the premises before the warrant was sought.

II

Officers In Executing A Search Warrant For Particularly Described Motor Vehicles, Which Were In Fact Located And Seized, Are Not Authorized To Further Search And Actually Seize Property That The Officers Neither Knew, Nor Had Probable Cause To Believe, Was Seizable Property For The Express Purpose Of Checking It Out.

As the search warrant here shows, these officers were specifically authorized to seize certain specified vehicles that were appropriately identified. Hence, it must be conceded they were not authorized by the warrant to seize any other vehicles. Yet, other vehicles were not

only searched but seized as well.

Given the officer's testimony that they lacked any knowledge at the time of these other vehicles as to "which, if any, were stolen" (SH 73), and that none were identified as stolen when seized (SH 63); there is no way the State can ever show the presence of probable cause to believe they could properly be regarded as seizable property. Simply put, the State was required to show not only the presence of probable cause to believe any property searched or seized was, in the context of the case, stolen property but exigent circumstances as well.

It is the fact that no effort was made to show, and just as surely no determination made as to, the presence of any exigent circumstances justifying the warrantless seizure of the Granada. The Record also fails to show before its

seizure the presence of probable cause to believe the Granada or any of the Granada parts were, in fact, stolen property. Indeed, the evidence is to the contrary (SH 63). Even this is not all, the Ford Granada parts Bernard Wilmoth was convicted of receiving as stolen property were only identified as such on September 23, 1979 (R 59). This was nineteen (19) days after the seizure.

As to the Ford truck, which the jury determined contained parts of the stolen Perkin's truck (Count I); the facts again were that the truck was seized on September 5, 1979, the date the warrant was executed. The parts Bernard Wilmoth was convicted of possessing as stolen property were identified by Perkins as stolen property on September 19, 1979 (R 33).

Our position here, simply put, is that lacking probable cause to seize this vehicle (SH 62-63), any evidence developed as a consequence of the seizure must be regarded as fruit of the poisonous tree and for that reason alone should have been suppressed. Wong Sun v. United States, 371 U.S. 471 (1963). This conclusion is certainly augmented by the further searches that were likewise made in the hopes of identifying stolen parts or a stolen vehicle.

For our part, the critical fact here is the officer's candid statement that at "the time that the search had taken place, none of the vehicles were identified as being stolen" (SH 63). Translated, this means that even before these vehicles in this case were towed, the police had affirmative contra-indications to them being stolen. Yet

they were seized. Even more incredible, these seizures were validated by the trial judge.

Since the police lack the power to make warrantless seizures of private property for the purpose of checking it out, it has to be that a seizure admittedly made for that purpose cannot be squared with fundamental criteria.

III

Even Assuming The Police Have Probable Cause To Seize A Particular Motor Vehicle As Probable Stolen Property, A Warrant Is Nonetheless Required As A Condition Precedent To Conducting A Meticulous General Or Exploratory

Search Of Such Vehicle
In An Effort To Verify
Whether The Vehicle Or
Any Of Its Parts Were,
In Fact, Stolen.

It can hardly be denied that the examinations made of these vehicles while they were in police custody were unconstitutional searches. The principle purposes of these searches, indeed their sole purposes, were to obtain information pointing toward the conclusion that the vehicles were stolen or contained stolen parts.

Given these facts, showing the total absence of any justification for a warrantless search, if fundamental criteria had been observed, a warrant was required. See United States v. Chadwick, 433 U.S. 1, 13 (1977), and Preston v. United States, 376 U.S. 364,

367-368 (1964). The efficacy of our position in this regard is really beyond dispute.

As to the tenure or "period" used here by the police to check these vehicles out, all will agree the police cannot simply confiscate people's property with impunity. Nor, can they with impunity hold people's property indefinitely. In addition, it is no answer to simply remit persons victimized by unreasonable delays, and other inconvenience, caused by the police to legal remedies before the required determinations are made (--that is, to return the property, to retain it as evidence or to retain it as forfeiture property). Since any enforced deprivation of one's property offends due process unless justified, it necessarily follows that under the facts here, there can be no other conclusion

than the specific finding that the delays here were both inordinate and unreasonable and, for that reason, unconstitutional. Since it was developed (during a period when the vehicles were being illegally held by the police) that they contained stolen parts, it follows for this reason as well that these searches offended Wilmoth's constitutional rights.

CONCLUSION

What it is that the State fails to grasp in this case, indeed in most cases, is the fact that "history shows the police acting on their own cannot be trusted". United States v. McDonald, 335 U.S. 451 (1948). And, that it was because of this reason, perhaps more than any other, that the requirements of the fourth amendment had to be imposed on the States by Mapp v. Ohio, 367 U.S.

643 (1961). The fact that this occurred in an Ohio case, particularly a Cleveland Police case, is most significant.

In this cause, however, we are concerned with the conduct of the Elyria Ohio Police and whether (assuming their search warrant was indeed valid) they could also seize and search the property involved in this case.

As argued above "the [plain view] doctrine is [only] properly applied to situations in which a police officer is not searching for evidence against the accused but nonetheless inadvertantly comes across an incriminating object." United States v. Sedillo, 496 F.2d 151, 152 (9th Cir. 1974). And, even then a plain view seizure is limited to items that are clearly incriminating (-- that is, "immediately apparent") and that inadvertantly encountered in the course

of a justifiable instrusion.

While the State doubtless credits the efficacy of these tenets, unless our assessment of the State's argument is being misread, we are being told in one breath that Wilmoth had no expectation of privacy" in the vehicles involved (Petition, p. 36). And, in the next breath we are told that Wilmoth's lack of an expectation of privacy is a relevant consideration on any question as to whether the police "inadvertantly" discovered the subject vehicles. Aside from the fact that these particular contentions make no sense at all, for our part they are symptomatic of a penchant for wild assertions of this ilk that are being made all too frequently by prosecutors. The real tragedy in all this is that many truly believe some of this heresy they put in their Briefs.

The Ohio Supreme Court was absolutely correct in ruling that the seizures here cannot be validated under the plain view doctrine. However, the Court should have also held that the warrant itself should never have been issued, and that the searches made of the vehicles after they had been towed required a warrant.

For our part, the pervading, although unexpressed, rationale for the State's rambling and convoluted arguments seems to be that what these officers did was reasonable. Indeed, for years our courts have reasoned that the ultimate test is always reasonableness since the constitution only prohibits unreasonable searches not seizures. The problem with this position is not limited to the fact that there are Judges who never have, and never will, rule that a search or seizure is bad. The real problem relates

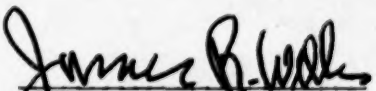
to the fact that our appellate Judges almost always rather automatically defer to the judgment of the trial Judges and the trial Judges defer to the police.

It is for this reason that the responsibility on this court is so grave. For if this court is unwilling to ratify appellate decisions like the one in this case, a good question would then exist as to when, if ever, another court will find the conduct of the police to be unreasonable -- the case here.

At least this much is certain, history also shows that any privilege to make a warrantless search or seizure that is sustained by this court will surely be interpreted and pushed to the limit by the police. This reason alone should add its weight to the opinions below and make affirmance even more highly desirable.

For all these reasons the Writ prayed for should be denied.

Respectfully submitted,



JAMES R. WILLIS, ESQ.
Attorney for Respondent
Suite 1609, Bond Court Building
1300 East Ninth Street
Cleveland, Ohio 44114
(216) 523-1100